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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 460

JACOB GREENES,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

THOMAS D. CALDWELL,
Attorney for Petitioner.

23 South Third Street
Harrisburg, Pa.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Leon F. Miller, Dauphin County Representative, Harrisburg, Pa.

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SUPREME COURT OF THE UNITED STATES

Oct. Term, 1947

No. .....

Jacob Greenes, Petitioner

vs.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, dated August 21, 1947, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, convicting him of conspiracy to commit an offense against the United States under Section 37 of the Criminal Code, 18 USCA, Section 88.

OPINIONS BELOW

The opinion of the District Court, denying the petitioner's motion for judgment of acquittal, will be found in the record at pages 925a-937a, and the opinion of the Circuit Court of Appeals will be found in the record at page 1223. As of this date, neither opinion has been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered August 21, 1947. A petition for rehearing was refused by the same court, September 30, 1947 (R. 1237). No opinion was rendered on this petition. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended; 28 USCA 347.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner, along with Albert W. Johnson, Donald M. Johnson, Miller A. Johnson, Albert W. Johnson, Jr., John Memolo, Hoyt A. Moore, Joseph Paul Jennings, Charles Korman, and David Schwartz, were indicted as co-conspirators, and charged with conspiring to obstruct justice in the Middle District of Pennsylvania, and to defraud the United States in violation of the provisions of 18 USCA, Section 88.

It was charged that the conspiracy began on or about February 1, 1934, and continued to December 31, 1944.

The indictment charged forty-six overt acts, covering eleven different cases or proceedings, in the District Court in which some action was claimed to have been taken by the defendant, Albert W. Johnson, who was judge of the said Court, in violation of his duty.

The indictment charged that in carrying out the conspiracy from time to time, various sums of money as gifts, presents or loans, or purported loans were made to, or received by the defendant, John Memolo, or your petitioner, or some of the other defendants, which were made and, in fact, received directly or indirectly by the judge himself, or through some of his sons. The purpose of the gifts was to affect the official acts of Judge Johnson.

The indictments against Hoyt A. Moore and Charles Korman were dismissed. The defendant, Joseph Paul

Jennings, died before trial, and a separate trial was granted as to David Schwartz. A jury acquitted Judge Albert W. Johnson and Albert W. Johnson, Jr. On appeal, the Circuit Court of Appeals for the Third Circuit reversed the conviction of Miller A. Johnson. The same Court refused to reverse the conviction of Donald M. Johnson, John Memolo and your petitioner. Petitions for rehearing were also refused.

In the indictment, forty-six overt acts, involving eleven cases, were charged against the defendants. All of these, however, save one, were eliminated from the case during the course of the trial. The overt act remaining, which affected your petitioner, was alleged as follows:

> "On or about July 9, 1943, Robert D. Michael, Trustee, by his attorney, filed a first and final account in the Central Forging case." (R. 1084)

The government contended that two additional overt acts not charged in the indictment were proven. One of these charged that your petitioner's brother gave Donald Johnson a check for $350.00. Your petitioner's brother testified that the check was given at the request of your petitioner, but that he had no knowledge of its purpose (R. 225a-227a).

The second overt act not set forth in the indictment, but which the government alleged was proven, was a meeting between Robert Michael, Donald Johnson and Miller Johnson. However, the court limited the effect of this alleged overt act to other defendants so that it did not affect your petitioner (R. 278a).

Summary Statement of Matter Involved

At the time of the trial, the special government prosecutor made prejudicial remarks concerning Hoyt A. Moore, senior partner of a famous New York law firm, and a witness for the petitioner. Among other things, he called Mr. Moore "a conspirator", "criminal conspirator", "holier than thou", and "Mr. Margiotti's particular pride and joy." He also charged him with swearing falsely, and stated that "he could buy the Judge any time" (R. 796a-798a). The District Court refused the defendant's motion for withdrawal of a juror, because of these remarks, and this ruling was affirmed by the Circuit Court of Appeals.

The Trial Court, in its charge, stated, "In the indictment in the case at bar, there are charged forty-six overt acts. As I mentioned a few minutes ago, some of them have been *proved* by the United States" (R. 821a). Counsel for the defendant objected to this portion of the charge, contending that it was up to the jury to find whether or not an overt act had been proven (R. 900a-902a). This objection was overruled by the Trial Court, and was not passed upon by the Circuit Court in its opinion.

QUESTIONS PRESENTED

1. Did the government prove the commission of an overt act in furtherance of the conspiracy within the statutory period of three years when the only acts proved within that period was one not set forth in the indictment, and another perfectly legal act of a trustee filing an account?

2. Did the Circuit Court err in affirming the trial judge's refusal to grant the petitioner's motion for acquittal on the ground of insufficiency of the evidence?

3. Did the Circuit Court err in affirming the trial judge's refusal to withdraw a juror and continue the case, because of the highly prejudicial and inflammatory utterance of the United States Attorney?

4. Did the Circuit Court err in affirming the action of the trial judge, in deciding that certain overt acts were proven, instead of submitting to the jury the question as to whether or not such acts were proven?

5. Did the Circuit Court err in affirming the trial court's ruling, admitting only a portion of the testimony given before the Grand Jury by the petitioner?

REASONS FOR ALLOWANCE OF THE WRIT

1. The opinion of the Circuit Court of Appeals is in conflict with the decisions of this court, relative to the requirement that an overt act be committed within the statutory period, in order to convict a defendant of conspiracy. *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812-815.

2. The jury was instructed by the court to restrict its findings to the forty-six overt acts alleged in the indictment, but the Circuit Court based its affirmance on an act not so set forth. The jury, therefore, did not follow the law as laid down by the court. This conflicts with the decisions of *Herron v. Southern Pacific*, 283 U. S. 91, 51 S. C. 383; *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740.

3. The decision of the Circuit Court is in conflict with the decision of the Supreme Court of the United States, as to requirements for a proof of a general conspiracy as set forth in the case of *Kotteakos v. United States*, 328 U. S. 750, 66 S. C. 1239.

4. The inflammatory remarks of counsel for the government were prejudicial.

5. The Trial Judge erred in stating to the jury that "Some of them [overt acts] have been proved by the United States."

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the

Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this Court, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals, had in the case numbered and entered on its docket, No. 9380, Jacob Greenes, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this court may seem proper.

October 28, 1947.

THOMAS D. CALDWELL,
Counsel for Petitioner.

Commonwealth of Pennsylvania,
County of Dauphin, ss:

Personally appeared, before me, a Notary Public, in and for said State and County, Thomas D. Caldwell, who, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein; that he has read the within petition and knows the contents thereof; that all the allegations in said petition are true to the best of his knowledge, information and belief.

THOMAS D. CALDWELL.

Sworn to and subscribed before me this 28th day of October, A. D., 1947.

Jean R. Greer,
Notary Public.

Reasons for Allowance of Writ

Certificate of Counsel

I hereby certify that the foregoing petition is, in my opinion, well-founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

THOMAS D. CALDWELL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Court below, the question of jurisdiction, and a statement of the matter involved have been set forth in the petition for a writ of certiorari.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals for the Third Circuit erred in the following respects:

1. In affirming the Trial Judge's refusal to grant the petitioner's motion for acquittal on the ground of insufficiency of the evidence, and that a general conspiracy was not proven.

2. In sustaining the Trial Court's holding that an overt act was committed within the statutory period.

3. In affirming the Trial Judge's refusal to withdraw a juror, because of the prejudicial utterance of the special United States prosecutor.

4. In failing to find that the Trial Court was in error in concluding that certain overt acts were proven, instead of submitting such a question to the jury.

5. In affirming the Trial Court's ruling, admitting only a portion of the Grand Jury testimony given by the petitioner.

ARGUMENT

I.

THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN YOUR PETITIONER'S CONVICTION, AND NO GENERAL CONSPIRACY WAS PROVED

The statute, under which your petitioner was convicted, is Section 37 of the Criminal Code (18 USCA Section 88), which reads as follows:

> "§88 *(Criminal Code, section 37) Conspiring to commit offense against United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

It was incumbent upon the government to prove beyond a reasonable doubt that there was a conspiracy or agreement between the several parties involved to commit an offense against the United States, and also to prove an overt act to affect the object of the conspiracy. It is our contention that the government has not met this burden.

The petitioner's counsel was strenuously contended from the very beginning of this case that this "one count"

indictment necessarily conceived Judge Albert W. Johnson, who was the presiding judge in the Middle District of Pennsylvania, as being "the heart—the core of the conspiracy to affect the administration of justice in that district." This view was accepted by the Trial Court. Judge Johnson was acquitted by the jury, and it is our contention that the entire conspiracy, therefore, falls, because if he is omitted from the case, each alleged act was a separate conspiracy and not a continuing one, and his removal from the case left nothing but a number of separate conspiracies. As the Trial Judge instructed the jury, it was necessary to find one conspiracy in order to convict any of the defendants. As the case now stands, such a finding would have been impossible.

This Court has said in the case of *Koteakos v. United States*, 328 U. S. 75, 66 S. C. 1239, that in a case where there was an indictment for single conspiracy, but the evidence showed a number of independent conspiracies: "The jury could not possibly have found from the evidence that there was only one conspiracy" (1249), and further said:

> "We do not think that either Congress, when it enacted Section 269, or this Court, when deciding the Berger case, intended to authorize the Government to string together for common trial eight or more separate and distinct crimes, conspiracies relating in kind though they might be, when the only nexus among them lies in the fact that one man participated in all."

See also *Canella v. United States*, 157 F. (2d) 470.

We realize that it has been held that common design, which is the essence of a crime of conspiracy, may be made

to appear when the parties steadily pursue the same object, whether acting separately, or together by common or different means. We submit that in the present case there is nothing to show a common design or purpose. There is no connection whatsoever established between the various acts alleged in the indictment, so that the burden of proof has not been met according to the requirements of the *Koteakos* case.

II.

THERE WAS NO OVERT ACT COMMITTED WITHIN THE STATUTORY PERIOD

The statute of limitations requires that an indictment in this case must have been found within three years after the offense shall have been committed (45 Stat. 51, 18 USCA 582). See *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812, 815.

The indictment in this case was filed September 11, 1945, and it was alleged that the conspiracy began on or about February 1, 1934.

The only alleged overt act within the statutory period affecting your petitioner was the imposition of a sentence by Judge Johnson on Theodore Koppelman. The sentence was entirely regular on its face, and the Trial Court charged the jury that nothing could be predicated upon the sentence. Another overt act alleged was the filing of an account on July 9, 1943, by Robert D. Michael, Trustee. This mere performance of a semi-judicial act in conformity

with law certainly cannot be construed as constituting an overt act in furtherance of a conspiracy.

As was stated in the case of *United States v. Biggs*, 157 F. 264, a conspiracy cannot be brought within the statutory period by merely alleging an overt act in the indictment which is within such period. The Court, in that case said:

> "The evident purpose of the pleader in inserting this overt act in the indictment is an attempt to toll the limitation of the statute." (274)

The government alleged additional overt acts not charged in the indictment. One of these was that Abe Greenes gave Donald Johnson, a check for $350.00. Abe Greenes testified that he gave this check at the request of the petitioner, but that he had no knowledge of the purpose of the check (R. I—225a-227a). The government also alleged that the petitioner was involved in the *Kizis* case in 1943. The Circuit Court, in its opinion, refers to the *Koppelman* and *Kizis* incidents (R. 1226). Attention is called to the fact that the only evidence concerning these overt acts was continued in Grand Jury testimony, and the Trial Judge charged that none of this Grand Jury testimony was to be considered as proof of overt acts, since it was not substantive testimony.

This would then leave only the cases of the Central Forging Company, which involved the filing of an account by the Trustee, Michael, and the Abe Greenes check.

The Central Forging Company had no application to your petitioner, who was not involved in any way. Only the Abe Greenes check incident is left. Johnson testified it was

in payment of an attorney's fee (R. I—684a). Abe Greenes said he did not know the purpose of the check (R. 227a). The jury should not, therefore, have been permitted to find "such transaction had as its purpose, the covering up of an illegal transaction, rather than a payment of an attorney's fee as Johnson testified."

Neither the *Kizis* case, nor the $350.00 check case was charged in the indictment. The Trial Judge, throughout his charge, stated to the jury that they would have to find whether or not the defendants committed the overt acts, as charged in the indictment. The Court used the following language: "In the manner and form set out an alleged indictment in this case" (R. I—813a). "No defendant could be convicted of an illegal, unlawful, improper, or other unethical act not charged in the indictment" (R. I—827a). Similar language was used time and again throughout the charge.

In the case of *Herron v. Southern Pacific*, 283 U. S. 91, 51 S. C. 383, it was said: "It is the duty of the Court to instruct a jury as to the law; and it is the duty of the jury to follow the law as is laid down by the Court."

We respectfully suggest that since the above charges were not laid in the indictment, the jury did not follow the law as laid down by the court, and your petitioner should be discharged.

III.

A JUROR SHOULD HAVE BEEN WITHDRAWN, BECAUSE OF THE PREJUDICIAL REMARKS OF THE SPECIAL UNITED STATES PROSECUTOR

The special government prosecutor referred to Hoyt A. Moore, a witness called by the defendants' Johnson, as follows:

> *"Yes, this fellow Moore. Mr. Margiotti's particular pride and joy. He can have him. I don't want him.*
>
> *That man, I will say it again, who goes to Europe for his holidays, who is supposed to be a leader of the Bar, that conspirator, because that is what he is. He is a criminal conspirator as established by the evidence in this case.*

He took that stand and you ladies and gentlemen will remember that attitude of Mr. Moore—holier than thou—and he took that stand and said that he had never discussed fees with anyone until after the property had been acquired, that he had never discussed this $250,000.00 with Memolo until the property had been acquired and the Circuit Court of Appeals had denied the appeal, and that was late in 1938.

Yet, on cross examination, when he was confronted by a letter that he wrote to Mumford, his local counsel, on October 7, 1937, you all know from the contents of that letter that that man Moore who had just gotten *through swearing falsely* that he had never discussed

fees with anyone until late in 1938—you know from that letter that he was writing and discussing fees on October 7, 1937, and all the explanations in the world cannot change that testimony nor that fact and Moore himself could not laugh it off by saying that he doesn't count that as a discussion of fees. If that letter to Mr. Mumford in regard to the fees of these receivers, ladies and gentlemen, isn't discussing fees, I wonder what in the name of God you would call it.

That man Moore! Yes. He could buy the Judge any time and the evidence showed that he did. A leader of the Bar!

(R. I—796a-798a)

Mr. Moore, a man of distinguished and genteel appearance testified that he is seventy-six years of age, a member of the firm of Cravath, Swaine and Moore. The firm was formerly Cravath, deGersdorff, Swaine and Wood (R. I—589a-590a). We believe that the Court will take judicial notice of the fact that this is one of the best known law firms in the United States.

Mr. Moore was never convicted of any crime. To brand him as a "criminal conspirator" after he had testified as a witness goes very low indeed in defamation. To criticize him as one who "goes to Europe for his holidays" (a trip was mentioned in his testimony) was obviously for the purpose of inflaming those members of the jury who might not be fortunate enough to be able to afford a vacation of this nature. It had no possible connection with the merits or the facts of the case and was clearly thrown in only for the purpose of arousing passion and prejudice.

The statement that he could "buy the Judge any time and the evidence shows that he did" was wholly unsupported by the evidence and bound to inflame the jury against the defendants.

We contend that on the authority of *New York Central Railroad v. Johnson*, 279 U. S. 310, 49 S. C. 300, judgment should be reversed if for no other reason than, because of the inflammatory remarks of counsel.

IV.

THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN FAILING TO FIND THAT THE TRIAL COURT HAS ERRED IN CONCLUDING THAT CERTAIN OVERT ACTS WERE PROVEN, INSTEAD OF SUBMITTING SUCH A QUESTION TO THE JURY

This question which was raised in the Circuit Court of Appeals was not specifically passed upon by that Court.

In its charge, the Trial Court said:

> "In the indictment in the case at Bar there are charged forty-six overt acts as I mentioned a few minutes ago. Some of them have been *proved* by the United States". (R. I—821a).

After the jury retired, the following colloquy took place:

> "'Mr. Margiotti: * * * Then shortly after the Court started charging on overt acts the Court used this language, "Some overt acts have been proven by the United States."

I was wondering whether the Court meant to tell the jury that as a matter of fact some of those overt acts were actually proven, and taking away from the consideration of the jury whether they were or whether they weren't.

From language following I gather that what the Court had in mind was that the Government had introduced some evidence of some of the overt acts mentioned in the indictment. The fact that the Court flatly told the jury that some of the overt acts have been proved might take away from them the right of passing upon whether those overt acts were actually proven.

I don't know if the Court recalls that language or not.

The Court: Oh, yes, I recall it.

Mr. Margiotti: I would take exception to that because I think that the facts are for the jury as to whether or not they have been proven.

I didn't believe that the Court intended to say as a matter of law that they had been proven and that the jury would not find, did not have the right to find that they were proven or not proven.

The Court: Well, they were proven.

Mr. Margiotti: All right. Then I take exception, if your Honor please, to that.

The Court: The Court wasn't telling the jury that they were done in accordance with and in pursuance of the conspiracy. Some of them were proven. You proved

some yourself. You proved the filing of the report of Michael, the first and final report in 1943, which is one of the overt acts charged.

Mr. Margiotti: You mean his report?

The Court: Yes.

Mr. Margiotti: Well, I assume that if any of the files have been proved—and there is no dispute about that—there is no question about them being proved.

The Court: That is what I thought.

Mr. Margiotti: It is just a question of whether they are overt acts as contemplated under the indictment.' "

(R. I—900a-902a)

(It will be remembered that by agreement the objection by counsel for one defendant would suffice for all defendants).

The Court did not thereafter correct this error but, as will appear from the above colloquy, had reaffirmed his position.

We feel that the Court fell into a serious misconception as to the meaning of the term, "overt act". We believe that these two words, standing alone, have no legal significance whatsoever. They are an abbreviation of the legal phrase, "overt act in furtherance of the conspiracy". There can be no innocent "overt act". The phrase denotes illegality of purpose.

Particular attention is directed to the one statement of the Court, above quoted, namely:

" 'The Court wasn't telling the jury that they were done in accordance with and in pursuance of the conspiracy. Some of them were proven. You proved some yourself. You proved the filing of the report of Michael, the first and final report, in 1943, which is one of the overt acts charged'."

From this, it is obvious that the Court felt that there could be an innocent "overt act" or a guilty "overt act". As pointed out before, this is not possible. The event in question constituted either an innocent happening or an "overt act in furtherance of the conspiracy". The event might be the opening of a door or the filing of a report by a trustee in bankruptcy. Neither of these acts is illegal in itself. Its innocence or illegality of purpose would have to be passed upon by the jury and the jury would have to decide that the event was illegal in purpose before it would constitute an "overt act in furtherance of the conspiracy".

It has been said:

" 'We are convinced that the questions whether a conspiracy existed as charged in the indictment and *whether an act was done* by one or more of the defendants *to effect the object of the conspiracy,* were clearly *questions* of fact *for the jury,* and that their verdict should not be set aside as against the weight of evidence.' " (Italics ours)

Marrash v. United States, 168 F. 225, 229.

It has also been held:

" 'And whether the alleged overt act *is such* is a *question of fact* for the *jury.* U. S. vs. Biggs (D.C.)

157 F. 264; Marrash vs. U. S. 168 F. 225, 93 C.C.A. 511.' " (Italics ours)

United States vs. Olmstead, 5 F. 2d 712, 714.

It has likewise been said:

" 'The indictment also charged that, for the purpose of the conspiracy to defraud the United States of its governmental functions, the honest, impartial, unbiased, and unprejudiced service and judgment of its officials was taken from it by fraud, with a view of enrichment of the conspirators, and the giving and taking of the money as alleged in the overt acts, were all acts to effect the object of the conspiracy and consummate the conspiracy. *Whether these acts did so or not were jury questions.* They were steps among many which entered into the conspiracy and to its fulfillment.' " (Italics ours)

Miller vs. United States, 24 F. 2d 353, 361.

It is clearly beyond question that in our case the Trial Court took away from the jury the power of deciding whether some of the acts relied upon by the Government were innocent acts or were "overt acts in furtherance of the conspiracy". Since this question was clearly for the determination of the jury and not for the Court, it amounted to substantial and fundamental error.

V.

IT WAS ERROR TO ADMIT ONLY A PORTION OF THE GRAND JURY TESTIMONY GIVEN BY THE PETITIONER

The petitioner had testified before the special Grand Jury on fifteen occasions. The Government offered in evidence as an admission against interest, or confession, his testimony on only two days (R. 1093-1094).

The defendant objected to this offer on the grounds that *all* of an admission against interest must be offered (R. 1098).

The Court ruled that the Government might offer the part above referred to. Inferentially, the ruling of the Court likewise limited cross examination to the same two days. This inference was forcibly brought out by the Court's statement as follows:

> "The Court: Well, there is no way, as I understand, that you can introduce that in the Government's case" (Original Testimony, 1043).

It is our contention that this ruling was error. Let us assume that the other days testimony contained contradictions of the portion offered. The jury may then have decided that no reliance could be placed in the defendant's Grand Jury testimony and have refused to predicate anything upon it. In a situation where the defendant did not take the stand (as in this case), the weight of the Grand Jury testimony was undoubtedly the deciding factor in a

finding of guilt or innocence. In fact, without this Grand Jury testimony there was practically no evidence at all against the defendant Jacob Greenes. If this testimony had been excluded, there is no doubt that Greenes would have been entitled to a directed verdict of acquittal on the grounds of a total absence of proof against him.

The principle of law upon which we base our contention has been followed both in our Federal and State Courts.

A Circuit Court of Appeals has held:

> " 'Conversations and declarations of the accused after his arrest formed no part of the res gestae, and in his behalf were inadmissible, but they were admissible against him if the prosecution saw fit to avail itself of them and when the U. S. proved the conversations and declarations and accused was entitled to have the full conversation or conversations given in evidence. This we understand to be elementary. * * * Where one part of a conversation is introduced the other party is entitled to all that relates to the same subject and all that may be necessary to fully understand the portion given.' "

Stevenson v. U. S., 86 Federal 106.

See also *U. S. v. Prior*, Federal Cases No. 16092, 5 Cranch CC 37.

Another Federal Circuit Court of Appeals held:

> "* * * 'Where part of a document or statement is used as self harming evidence against a party, he has a right to have the whole of it laid before the jury, who

may then consider, and attach what weight they see fit to any self-serving statements it contains.' "

Perrin v. U. S., 169 Federal 17.

A State Court held:

" 'The object of the party using such declaration or admissions against the party who made them is only to ascertain that which he conceded against himself; yet, unless the whole is received and considered, the true meaning and import of the part which is evidence against him cannot be ascertained. It is therefore a rule of evidence that the whole declaration or admission of the party made at one time shall be taken together; but the jury are at liberty to believe a portion and disbelieve the other, as they are all evidence.' "

Johnson v. Powers, 40 Vt. 611, 612.

See also *Newman v. Bradley*, 1 Dall. (Pa.) 240; *Levy v. State*, 49 Alabama 390; *King v. State*, (1915) 117 Ark. 82, 173 S.W. 852; *Coon v. State*, (1849) 13 Smedes and M. (Miss.) 246.

In view of the Court's statement,

" 'The Court: Well, there is no way, as I understand, that you can introduce that in the Government's case.' "

counsel for Greenes could not have elicited on cross examination from the witness for the Government, evidence as to what Greenes had testified to differently on thirteen other occasions before the special Grand Jury. This statement of the Court was likewise error.

It has been held:

> " 'Where the prosecution proves statements of an accused tending to show that he is guilty, the rule that a defendant in a criminal case has no right to introduce in evidence self-serving statements does not preclude him from eliciting on cross examination of the witness for the prosecution, the whole of the subject matter, even though statements so drawn out are favorable to him.' "
>
> *Commonwealth v. Britland*, 15 N.E. (2d) 657 (Mass.).

See also annotations appearing in 118 ALR 138 upholding this doctrine in many states.

It is, therefore, respectfully submitted that this case is one for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

THOMAS D. CALDWELL,
Counsel for Petitioner.